Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 755

Tribunal File Number: AD-19-182

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 12, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division erred by refusing jurisdiction over earnings and allocation, but the Commission's decision that the Claimant is disentitled to benefits is upheld.

OVERVIEW

[2] At the time that the Appellant, A. M. (Claimant), separated from her employment, she negotiated a sizeable settlement that included a statutory payment in lieu of notice, vacation pay, severance pay, and an employer RRSP contribution amount (the "severance package"). The Claimant also applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), calculated the total value of the Claimant's severance package and allocated it to weeks of benefits within the Claimant's benefit period. Even though the Commission extended the benefit period to 104 weeks, it calculated that the severance package would not be fully allocated by the end of the Claimant's benefit period. As a result, the Commission found that the Claimant was not entitled to Employment Insurance benefits.

[3] The Claimant requested a reconsideration but the Commission did not change its decision. The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her claim. She is now appealing to the Appeal Division.

[4] The appeal is dismissed. The General Division erred in refusing jurisdiction over the Claimant's earnings and allocation. However, I have made the decision that the General Division should have made and I find that the Commission's allocation of earnings was in accordance with the Employment Insurance Act and Regulations. Therefore, the Claimant remains disentitled to benefits to the end of her extended benefit period.

ISSUE

[5] Did the General Division refuse to exercise its discretion when it considered only whether the benefit period could be extended beyond 104 weeks?

ANALYSIS

[6] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The grounds of appeal are described below:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material.

Did the General Division refuse to exercise its discretion when it considered only whether the benefit period could be extended beyond 104 weeks?

[8] The General Division determined as a preliminary matter that the issue before it was, "solely the maximum length of a benefit period".[1] The General Division decision states as follows, "[s]ince no reconsideration was requested or performed on the respondent's initial earnings and allocation decision, [the General Division has] no jurisdiction to make a finding on these issues."[2]

[9] The General Division refused jurisdiction over the earnings and allocation issues. The question is whether it erred by refusing jurisdiction.

[10] The issues that are within the jurisdiction of the General Division to consider, are those issues finally determined by the commission in the reconsideration decision.[3] The reconsideration decision says this:

> We regret to inform you that we have not changed our decision regarding this issue. The decision, as communicated to you on April 16, 2018, is

[1] General Division, para. 4.
[2] General Division decision, para. 16.
[3] Section 113 of the *Employment Insurance Act*

> therefore maintained. Your claim for regular benefits was established on February 5, 2017. An allocation of severance, pay in lieu of notice, and vacation pay in the amount of $195,875 was allocated to the period of February 5, 2017, to April 13, 2019.

[11] The Commission apparently communicated the reconsideration decision that maintained the original decision on April 16, 2018. However, there is no written decision on the General Division record. In her request for reconsideration, the Claimant confirmed that the Commission verbally communicated a decision to her in April 2018, but it did not send her a decision letter.[4] Unfortunately, the Commission did not document the conversation in which it communicated its decision to the Claimant. The Claimant's request for reconsideration does not assist. In it, she expressed dissatisfaction that she did not receive benefits owing to her severance, but she did not otherwise clarify the disputed issues.

[12] As a result, the only documentation of the Commission's actual decision (and of the issues it reconsidered) is the actual reconsideration decision. The reconsideration decision refers to the date on which the Commission established the claim, the fact that it considered a total amount of $195,875.00 to be severance, that it allocated that severance, and the period over which it allocated the severance.

[13] In the hearing, the General Division questioned whether the Claimant's difficulty with the Commission's decision was that the Commission did not take into account all the "extras" in determining her normal weekly earnings and the Claimant agreed with this manner of framing her concerns.[5] If her normal weekly earnings had been calculated correctly, the Claimant believed her separation payments would have been fully allocated by 81 weeks and that she could then have claimed benefits in the remaining weeks of her extended benefit period.[6]

[14] After some discussion of the General Division's willingness to receive and review a copy of the Claimant's settlement agreement, the General Division member stated that she would, "be able to look and make sure that everything that was called earnings under section 35 of the

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[4] GD3-22
[5] Audio recording of General Division hearing at 37 minutes and 30 seconds (denoted 37:30)
[6] *Ibid*. at 35:55.

[*Employment Insurance*] Regulations was correctly called earnings … and then [the member would] look at whether it was correctly allocated."[7]

[15] However, when the General Division issued its decision, it did not address the Claimant's particular concern with the amount of her "normal weekly earnings". Nor did it address any other issue arising from the characterization of the severance package as earnings, or how the package was allocated. The General Division simply confirmed that the legislation does not permit a benefit period to be extended beyond 104 weeks.

[16] I find that both the characterization of amounts received by the Claimant as earnings, and the manner in which those earnings were allocated to weeks of benefits, were issues that were clearly before the General Division. The General Division restricted its decision and analysis to the question of whether a benefit period can be extended beyond 104 weeks. In so doing, the General Division refused to exercise its discretion and erred under section 58(1)(a) of the DESD Act.

REMEDY

[17] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, to refer the matter back to the General Division with or without directions, or to confirm, rescind or vary the General Division decision in whole or in part.

[18] The Commission's submissions to the Appeal Division support a finding that the General Division erred by refusing to exercise its discretion. The Commission accepted that the General Division had not addressed all of the issues arising from the reconsideration decision. The Commission submitted that the record is complete and that I should make the decision that the General Division should have made.

[19] Although the General Division ultimately restricted itself to determining whether the benefit period might be extended beyond 104 weeks, I accept that the Claimant was able to put forward evidence related to her earnings and allocation. This included the additional evidence

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[7] *Supra note 5* at 38:55

she supplied post-hearing. The Claimant disagreed with the characterization as earnings of all of the various payments that the employer paid her on separation. However, she did not dispute that she received these payments, the amounts of the various payments, or their individual identification as severance, vacation pay, pay in lieu of notice, or compensation in lieu of an RRSP contribution.

[20] The only factual dispute that arose in the hearing concerned the calculation of her normal weekly earnings, and I am satisfied that she had the opportunity to address this in her testimony, and that she supplied additional post-hearing evidence by which normal weekly earnings might be inferred. Therefore, I agree with the Commission that the record is complete. I will make the decision that the General Division should have made.

[21] I appreciate the Claimant's concern that the manner in which the Commission arrived at its total and its original calculation of her normal weekly earnings is not transparent. I note that the General Division understood that the Commission used $1,740.00 for the Claimant's normal weekly earnings whereas the Commission's current submissions indicate that the normal weekly earnings should be $1,875.00. The Commission says that it based this revised figure on the materials that the Claimant filed to the General Division after her hearing.

[22] The only information the Claimant sent to the General Division that would be useful to determine the normal weekly earnings is the letter from her employer describing a payment of $108,187.50 as being the equivalent to 57 weeks of the Claimant's regular salary.[8] This suggests that the Claimant's normal weekly earnings should be $1,898.00 ($108,187.50 / 57 weeks). I therefore accept that the Claimant's normal weekly earnings were $1,898.00.

[23] The employer calculated her "total package" as equivalent to 81 weeks after adding the pay in lieu of notice and a $30,000.00 severance payment, already paid. This total is $153,187.50. If I divide this total by the $1,898.00 as normal weekly earnings from the calculation above, this results in a quotient of approximately 81 weeks. I was left with the impression that the Claimant believed she should be entitled to additional weeks within the extended benefit period because she understood she had received only 81 weeks of severance.

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[8] GD5-4

[24] According to section 36(9) of the *Employment Insurance Regulations* (Regulations), amounts that are paid or payable to a claimant because of layoff or separation from employment must be allocated to consecutive weeks starting with the week of the lay-off or separation in the same manner as described above. Clearly, the "severance" amount of $146,250.00 was paid to the Claimant because of her separation from employment, so it is allocable.

[25] However, the $146,250.00 severance amount is not the only amount that should be allocated under section 36(9). The employer contributed an additional $20,000.00 towards the Claimant's Group RRSP. Section 35(2)(e) of the Regulations states that an amount paid "in a lump sum on account of or in lieu of a pension" is earnings. Because the RRSP amount was paid as a result of the Claimant's separation from employment, it is allocable in accordance with section 36(9).

[26] The $15,000.00 amount designated as statutory pay "in lieu of notice" also arises out of the employment relationship with the Claimant's employer and are therefore income arising out of employment. This was also paid as a result of the Claimant's separation from employment. It is also allocable under section 36(9) of the Regulations.

[27] The payments for severance, RRSP contribution, and the pay in lieu of notice total to $181,250.00. This is allocable under section 36(9) of the Regulations.

[28] The Claimant argued at the Appeal Division that it was a mistake for the Commission to have allocated her vacation pay. In fact, section 36(8) of the Regulations states that vacation pay that is paid because of layoff or separation must be allocated to a number of weeks starting with the first week for which it is payable in such a manner that, for each week except the last, the allocated amount is equal to the normal weekly earnings.

[29] According to the employer's offer of February 8, 2017, the Claimant's last day of employment was February 8, 2017. Her employer offered the Claimant her full 2017 vacation entitlement plus 10% of her 2018 earnings up to and including April 8, 2017.[9] Therefore, I accept that the vacation pay payment of $14,625 that she eventually received (confirmed by the

[9] GD5-2

employer on March 20, 2018[10]) related to future vacation entitlement, and was a payment because of her separation from employment. The Commission was correct to allocate the vacation pay.

[30] The Claimant became entitled to the vacation pay amount for 2017 and for the first quarter of 2018, shortly after she left her employment. The Claimant did not provide documentation of the final agreement, but I presume that the agreement was made effective as of the date of her separation from employment. I therefore accept that the vacation pay should have been allocated from the week of her separation forward, which is the week of February 5, 2017.

[31] When the $14,625.00 vacation pay that is allocable under section 36(8) is combined with the $181,250.00, allocable under section 36(9), the total amount to be allocated as earnings comes to $195,250.00, which is the same as the total identified in the Commission's decision letter.

[32] This total amount must be allocated against each week in which benefits would otherwise be payable at the rate of $1898.00 per week. This means that it would take 103 weeks to fully allocate the separation payments.

[33] According to section 10(2) of the *Employment Insurance Act* (EI Act), the maximum benefit period is usually 52 weeks. However, section 10(10)(b) states that the benefit period is extended by the aggregate of any weeks during the benefit period that the claimant was not entitled to benefits because the claimant was in receipt of earnings that were paid because of the complete severance of her relationship with her employer. Section 10(14) states that the benefit period cannot be extended beyond 104 weeks.

[34] The benefit period is the period within which benefits *may* be paid. Benefits cannot be paid outside the benefit period. The only reason that the benefit period would have been extended in the Claimant's case is that she received payments arising from her separation, whose allocation would have disentitled her to benefits until those payments were fully allocated. In this case, the Claimant's payments were not fully allocated until after 103 weeks, leaving a single

[10] GD3-20, 21

week in her benefit period in which she might have collected benefits, assuming that she was also capable and available for work and unable to find suitable employment in that week.

[35] However, section 13 of the EI Act states that a claimant is not entitled to be paid benefits until he or she has "served a waiting period of one week of unemployment for which benefits would otherwise be payable". The Claimant was disentitled to benefits until her various separation payments were fully allocated, which was week 103. Therefore, the first week for which benefits would have been payable to the Claimant is her week 104. According to section 13, the Claimant would need to serve that week as a waiting period.

[36] Therefore, the Commission could not pay the Claimant benefits in week 104. Since benefits can only be paid within the benefit period and a benefit the benefit period cannot be extended beyond the maximum 104 weeks, this means the Claimant cannot be paid benefits at all. I appreciate that this may seem like a final affront to the Claimant, but the one-week waiting period takes up the last week of her extended benefit period.

[37] Because of the allocation of the various payments associated with the Claimant's separation from employment, the Claimant is not entitled to any benefits.

CONCLUSION

[38] The Claimant has established that the General Division refused to exercise its jurisdiction, which is an error under section 58(1)(a) of the DESD Act. However, in substituting my decision for that of the General Division, I must still find that the allocation of the Claimant's various payments on separation has disentitled the Claimant to benefits through the entirety of the extended benefit period.

[39] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	July 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. M., Appellant